IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

Cr.Appeal 639 of 2000

Decided on 25th September,2007

State of H P — Appellant

Versus

Kesar Singh & others — **Respondents**

Coram:

The Hon'ble Mr.Justice Surinder Singh.J.

Whether approved for reporting ?[1] *yes*

For the appellant : **Mr. Som Dutt Vasudeva, Additional Advocate General.**

For the Respondent **Mr Anuj Nag, Advocate, vice Mr. Baldev Singh Atri, Advocate.**

Surinder Singh, J.(oral)

The respondents were facing trial under Sections 147,452,323 and 506 red with Section 149 of the Indian Penal Code but they were acquitted precisely on the grounds that the prosecution failed to examine its witnesses despite many opportunities. Thus the acquittal of the respondents has been challenged in this appeal.

As a matter of fact the respondents were charge sheeted on 4.2.1997 by the Judicial

---

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment ? yes***

Magistrate Ist Class (IV), Shimla, under the aforesaid sections, to which they pleaded not guilty and claimed trial. Thereafter, the matter was fixed for prosecution evidence on 20.5.1997, since then the case lingered on one pretext or the other.

However, on 31.12.1999, the trial court passed the following order:

> *"31.12.99 Present: Ms. Monika Malhotra, APP for State.*
> *All accused are in person with Sh. B. S. Atri, Advocate.*
>
> *No PWs are present. PW Dr. Ashok Kumar is unserved. PW Ram Krishan, ASI Bishan Dutt and S.I. Tilak Raj are served but not present. Put up for PWs. PWs.Sr.No.1 to 3 be served through B/W in the sum of Rs.500/- for* ***19.4.2000*** *and PWs Sr.No.6 and 7 through summons and PWs Sr.No.5,8 and 9 through B/W in the sum of Rs.500/- for* ***20.4.2000****.*
>
> *Sd/*
> *Judicial Magistrate(IV)*
> *Shimla."*

The case was fixed for two different dates, for recording the prosecution evidence. The matter was taken up on 19.4.2000, on which date three PWs namely Pardeep Kumar, Punam and Kamla were served

through bailable warrants but were not present and the case was ordered to be taken up on 20.4.2000 and on that date three witnesses Dr. Ashok Thakur (PW1), Tilak Raj (PW2) and Kishan Dutt (PW3) were present and their statements were recorded.

The trial court wrongly closed the evidence of the prosecution on 20.4.2000 without taking any action against the prosecution witnesses, who despite their service, were not present on the previous day i.e. on 19.4.2000 on the ground that the prosecution failed to examine its witnesses despite various opportunities granted in this behalf by applying the ratio of Raj Deo Sharma's case (AIR 1998 S.C.328) which was over-ruled by the Constitution Bench of the Supreme Court in P.Ramchandra Rao vs State of Karnataka (2002 Cr.L.J.3271) and acquitted the respondents, without recording the statements under section 313 Cr.P.C..

It is apparently clear that the learned Judicial Magistrate had devised a novel method to dispose of the case in a most unwarranted manner, without application of judicial mind, which has scuttled the trial and stultified the access to justice and gave easy exit to the portals of

justice. In fact, it was the duty of the trial court, in the given circumstances to have procured the presence of the witnesses, who did not turn up despite their service through bailable warrants and it was within the powers of the Judicial Magistrate having proceeded under section 350 of the Code of Criminal Procedure to compel their presence and take action against the surety, if any, as per the provisions of section 446 of the Code, but by not resorting to these provisions, the trial court was not justified to put a blame on the prosecution to close its evidence, which of course has manifestly caused a miscarriage of justice and further delayed the trial.

Thus, the impugned order as well as the judgment of acquittal passed by the learned trial court is perverse and passed without application of mind, therefore, set aside. Consequently, the appeal is accepted and the case is remanded back to the learned trial court with a direction to procure the presence of the prosecution witnesses and record their statements in accordance with law and decide the matter afresh on the basis of the evidence on record.

The parties are hereby directed to be present before the learned trial court on **26th October, 2007**.

Keeping in view the old pendency of the case, the trial court is directed to dispose of the matter on or before **31st December, 2007**. The matter is accordingly disposed of.

September 25,2007 (Surinder Singh),J.
(D)